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No. 96-827

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LEONARD ROLLIN CRAWFORD-EL,
Petitioner,

v.

PATRICIA BRITTON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE STATES OF MISSOURI, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, HAWAII, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND THE TERRITORIES OF GUAM AND THE VIRGIN ISLANDS

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QUESTIONS PRESENTED

I.

Whether, in an action under 42 U.S.C. § 1983, the imposition of a "clear and convincing" burden of proof is consistent with the protections afforded government officials by qualified immunity, and as enforced by a majority of the circuits through heightened procedural protections.

II.

Alternatively, whether the Court should address the issue left open in *Leatherman v. Tarrant County Narcotics Unit* and confirm that qualified immunity jurisprudence requires a heightened pleading standard in § 1983 cases involving individual government officials.

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BRIEF OF THE STATES OF MISSOURI,

Pursuant to Sup. Ct. R. 37, the thirty-three signatory States, and the Territories of Guam and the Virgin Islands respectfully submit this brief as *amici curiae* in support of respondent.

STATEMENT OF *AMICUS* INTEREST

This case presents an important question concerning government officials' right to qualified immunity and its effective enforcement by the courts in actions brought against those officials under 42 U.S.C. § 1983. This right is protected through an objective test, and the Circuit Court for the District of Columbia adjusted the burden of proof in order to ensure its effective application.

The practical application of the test in such cases, where government officials face personal liability, is of extraordinary importance to those officials. Without the employment of a means that effectively ensures their entitlement to qualified immunity is protected, and that they will not be unnecessarily subjected to the burdens of litigation, government officials will be distracted in the performance of their duties, and deterred from the lawful, vigorous exercise of their discretion. The public good will suffer in turn.

Nowhere are the dangers of interference with government officials' duties more acute than in cases of the type that Crawford-El brings, concerning an alleged retaliatory motive. Such a claim, easily made and difficult to disprove short of discovery and trial, aptly illustrates the need for the imposition of the pleading and proof burdens imposed on plaintiffs who choose to sue government officials. Lowering those burdens would dramatically dilute, if not eviscerate, the protection that qualified immunity currently affords those who have chosen to carry out critical government functions.

STATEMENT

Leonard Crawford-El is a prisoner in the District of Columbia correctional system, serving a life sentence for murder. He sued Patricia Britton, a D.C. correctional official, under 42 U.S.C. § 1983 for failing to follow his delivery instructions for some boxes of his personal property. The crux of his claim is that Britton did not deliver them directly to him; rather, she did so indirectly, through his brother-in-law. He alleges that this misdelivery was an act of retaliation for his prior contact with the media and thus violated his First Amendment rights.

The case has had a tortured procedural history below. Crawford-El filed suit in 1989. The district court denied Britton's initial motion for dismissal and summary judgment, in which she asserted her entitlement to qualified immunity, and Britton appealed. The Court of Appeals for the District of Columbia Circuit applied a heightened pleading standard to Crawford-El's allegations and remanded to permit the district court to decide whether to permit repleading. *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991).

Crawford-El was permitted to replead and did so, by filing his Fourth Amended Complaint. Two claims that had appeared in prior incarnations of the complaint, access to courts and due process, again suffered dismissal by the district court, and that decision was affirmed. *Crawford-El v. Britton*, No. 94-7203, Mem. Op. at 1-2 (D.C. Cir. Nov. 28, 1995).

Among the claims made in the Fourth Amended Complaint was one that appeared for the first time in that pleading: That Britton's actions were taken in retaliation for Crawford-El's exercise of his First Amendment rights in

communicating with the press. In dismissing that claim, the district court held Crawford-El failed to allege "direct" evidence of Britton's unconstitutional motivation. *Crawford-El v. Britton*, 844 F.Supp. 795, 802 (D.D.C. 1994).

The D.C. Circuit heard *en banc* the dismissal of Crawford-El's First Amendment retaliation claim. The Court issued divergent opinions, but its central holding was that to defeat a claim of qualified immunity in a case that turns on an official's alleged impermissible motive, a plaintiff must establish that motive by clear and convincing evidence. 93 F.3d at 821-23. The Court went on to hold that plaintiff is not entitled to discovery to carry his burden unless he can also show, through evidence that he possesses, that there is a "reasonable likelihood" that the discovery he seeks will "support his specific factual allegations concerning the" official's impermissible motive. 93 F.3d at 841 (Ginsburg opinion). Although the court of appeals thus reaffirmed the rules Britton said were necessary to fully preserve the qualified immunity defense, it vacated the dismissal of the First Amendment claim, to again give Crawford-El a chance to bolster his evidence. 93 F.3d at 829.

This Court granted Crawford-El's petition for a writ of certiorari, on the questions presented therein. 65 U.S.L.W. 3817.

SUMMARY OF ARGUMENT

The doctrine of qualified immunity exists to promote effective and efficient government by freeing government officials of the distractions, fear and paralysis of personal liability for their official acts. So important is this protection and the interests that it serves that this Court mandated in *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987), that an

official's entitlement to it must be determined at the earliest possible juncture. Without an immediate determination of entitlement, officials are subjected needlessly to the costs and demands of discovery in cases in which they may ultimately be found to be immune. Special mechanisms are necessary to allow district courts to make the qualified immunity determination early in accordance with the *Anderson* mandate.

The costs associated with civil actions against government officials are particularly high when the subjective intent of the defendant official is an element of plaintiff's claim. Subjective intent is easy to allege and hard to disprove, and as the Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982), inquiry into the motivation of the defendant may entail far-ranging discovery into the affairs of the defendant and the deposing of numerous other government officials and colleagues, thus bringing them into the inefficiency equation. In *Crawford-El*, the D.C. Circuit appropriately addressed these increased costs by requiring the plaintiff to come forward with clear and convincing evidence of motive in order to defeat the defendant official's entitlement to qualified immunity. This standard not only appropriately meets the concerns raised by claims encompassing subjective intent, but is also identical to the standard already accepted by this court for use in similar tort causes of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)(clear and convincing standard to be used in libel action against public official). This Court should affirm the D.C. Circuit's application of a clear and convincing evidence standard in § 1983 and *Bivens* actions.

If this Court does not adopt the clear and convincing evidence standard promulgated by the *Crawford-El* decision, it should endorse the use of a heightened pleading standard in § 1983 and *Bivens* actions. An official's entitlement to

qualified immunity must be determined at the earliest possible stage of the litigation. In order to carry out this mandate, district courts must be furnished with enough facts to make the determination. This requires that plaintiffs set forth a statement of the events and occurrences giving rise to their claim. This requirement does not run afoul of the pleading requirements contemplated by the Federal Rules of Civil Procedure and is appropriate and necessary if district courts are to follow this Court's mandate and determine entitlement to qualified immunity at the earliest possible opportunity.

ARGUMENT

MEANINGFUL APPLICATION OF THE DOCTRINE OF QUALIFIED IMMUNITY REQUIRES THE COURTS' USE OF SOME FORM OF HEIGHTENED PROCEDURAL PROTECTION.

A. The District of Columbia Circuit's clear and convincing evidence standard is an effective means of accomplishing the policies underlying qualified immunity.

For fifteen years, the test for qualified immunity of government officials has turned on a purely objective standard. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Hundreds, perhaps thousands of state and local government officials have relied on this simple but significant test. Crawford-El's request that this Court substantially loosen the pleading burden imposed on those

suing government officials threatens to dramatically increase the burdens that litigation imposes on those who have chosen to carry out critical governmental functions. This Court should endorse the D.C. Circuit's clear and convincing evidence standard.

The modern qualified immunity calculus protects officials from the "general costs of . . . the risks of trial - distraction of officials from their governmental duties, inhibition of discretionary action, and deterring able people from public service." *Harlow*, 457 U.S. at 816. It is also devoid of any subjective element, because "[j]udicial inquiry into subjective motivation . . . may entail broad ranging discovery and the deposing of numerous persons, including an official's professional colleagues." *Harlow*, 457 U.S. at 816-817. Fishing expeditions, seeking to find some shred of evidence to support a sincerely-held but baseless belief, can be peculiarly disruptive of effective government. *Id.* Indeed, the need to ensure that government can continue to function has led this Court to permit government officials who have been denied qualified immunity following pre-trial dispositive motions to take multiple appeals even before being faced with the burdens of trial on the merits. *Behrens v. Pelletier*, 116 S.Ct. 834, 840 (1996).

The circuits in which the amici appear have responded to the challenge of effectively protecting qualified immunity by using some form of heightened procedural protection, whether by imposing on plaintiffs a requirement of pleading a complaint with heightened specificity, *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995), *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991) and *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989); requiring a fact-specific reply to an answer asserting qualified immunity, *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995)(en banc); or as in the case of the D.C. Circuit, experimenting with different burdens of

persuasion, *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1431 (1987) and *Crawford-El*. Each method recognizes the truism that it is easy to allege a generalized complaint against a state or local official who made a decision the plaintiff does not like.

The case before the Court involves a claim in which the alleged subjective, retaliatory motive of an official is an element of the plaintiff's cause of action. The rule in *Harlow* sprang from analogous claims, involving allegations that senior aides and advisors of the President of the United States conspired against and for retaliatory reasons terminated plaintiff Fitzgerald, a former employee of the Department of the Air Force whose loyalty to the administration was questioned. 457 U.S. at 802. In spite of years of discovery, the Court described the evidence that supported Fitzgerald's claims as "inferential." 457 U.S. at 803. *Harlow* thus stands as a principal example of the waste of officials' time and resources that results when they are required to proceed with discovery in cases in which they are ultimately found entitled to qualified immunity.[1]

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[1] This scenario is not uncommon. *See, e.g., Peppers v. Coates*, 887 F.2d 1493 (11th Cir. 1989). There an arrestee filed a civil rights action against Secret Service agents complaining of constitutional violations in connection with his arrest. The complaint was filed in 1985. It survived a motion for dismissal, or in the alternative, summary judgment and the plaintiff proceeded with discovery. It was only after discovery that the defendants were able to file motions for reconsideration of the request for summary judgment. The district court ultimately denied them summary judgment. 887 F.2d at 1495. Four years after suit was initiated, the Eleventh Circuit determined defendant Coates was entitled to qualified immunity. *Id.* at 1499. The case of *Turner v. Scott*, 119 F.3d 1425 (6th Cir. 1997), is similar. There, an arrestee sued a police officer, among others, for failing to prevent another officer from using excessive force. Turner filed suit in 1994 and amended her complaint, which survived various motions to dismiss. After extensive discovery, the trial court denied the officer's motion for summary judgment in which he asserted qualified immunity. Over two years after the suit was initially filed, the Sixth Circuit held the officer was entitled to summary judgment on the basis of qualified immunity. 119 F.3d at 430. *Metlin v. Palastra*, 729 F.2d 353 (5th Cir. 1994), is also illustrative. Therein, the defendants were denied motions to dismiss and after substantial discovery, sought dismissal or summary judgment on the basis of absolute or qualified immunity. The trial court denied the motion and the Fifth Circuit reversed, holding that the plaintiffs had not even identified the violation of clearly established law. 729 F.2d at 356. But by that time the attention of the defendant officers and their department, which should be focused on protection of the public, had instead been directed to litigation for nearly three years. *Crawford-El* asks this Court to announce a rule that would sanction such distractions.

Such discovery violates officials' right to qualified immunity, a right that is effectively lost if a case is erroneously permitted to go forward, whether for purposes of discovery or trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). This right is not susceptible to exceptions. It "reflects a balance that has been struck 'across the board.'" *Anderson v. Creighton*, 483 U.S. 632, 642 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982)). Thus, government officials are no less entitled to the effective enforcement of their right to qualified immunity in unconstitutional motive cases than they are when motive is not an element. And in unconstitutional motive cases, the need for rigorous protection of qualified immunity is all the more great. Unconstitutional motive is "easy to allege and hard to disprove." *Crawford-El*, 93 F.3d at 821 (citations omitted).

Courts are also familiar with the pre-trial application of the D.C. Circuit's evidentiary standard in cases involving a defendant's state of mind. This Court has addressed the application of such a standard at the summary judgment stage in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Anderson* was a libel suit brought by a public official, thus involving the *New York Times Co. v. Sullivan*, 376 U.S. 254

(1964), clear and convincing standard. The Court remanded *Anderson* with directions that ruling on the defendant's motion for summary judgment be guided by the *New York Times* standard. 477 U.S. at 257. The Court admonished that the mere fact that the defendant's state of mind was at issue did not preclude summary judgment on the defendant's behalf. 477 U.S. at 256.

Petitioner and amici in support thereof argue that the district court's standard will permit meritorious claims to go without redress. This is actually an attack against qualified immunity, for it is a possibility that exists regardless of the evidentiary standard applied. Qualified immunity is a legal defense that provides immunity from suit, providing "ample room for mistaken judgments." *Malley v. Briggs,* 475 U.S. 335, 343 (1986). Because it is just that, an immunity, it can free an official from a lawsuit regardless of whether "he acted wrongly." *Richardson v. McKnight,* 117 S.Ct. 2100, 2103 (1997) (*citing Wyatt v. Cole,* 504 U.S. 158, 171-72 (1992)).

Contrary to petitioner's suggestion, and the suggestions of amici in support thereof, it is not enough to point to the strict enforcement of summary judgment standards for the proposition that officials' entitlement to qualified immunity is already adequately protected. That premise was implicitly rejected each time the Court said that officials could cut off pretrial procedures in ways not normally available to defendants. *See,* e.g., *Behrens, supra* (immediate, multiple appeals of denials of qualified immunity permitted). The need for such special rules should be apparent from the limitations contained in the usual discovery procedures. For example, while courts may use Rule 56(f) to preclude discovery and weed out meritless claims, the rule permits a court to refuse to grant summary judgment until discovery is had, and contains no explicit restriction of discovery in cases in which qualified immunity is asserted.

Therefore, while the courts' faithful adherence to Rule 56, including subpart (f), and caselaw surrounding the application of the Rule may be entirely compatible with the goals of qualified immunity, it alone will not ensure that a defendant official's right to qualified immunity is achieved.

Weighed against this, the burden on the states and their officials in defending against civil rights suits is real. In his opinion concurring in the judgment in *Clinton v. Jones,* 117 S.Ct. 1636, 1652 (1997), Justice Breyer noted that the number of civil rights lawsuits filed annually in the federal district courts between 1960 and 1995 has increased four fold, from under 60,000 to about 240,000, with a corresponding increase in the number of federal district court judges, from 233 to about 650. He further notes that "the time and expense associated with both discovery and trial have increased," and that "an increasingly complex economy has lead to increasingly complex sets of statutes, rules and regulations, that often create potential liability, with or without fault." *Id.* In his concurring opinion in *Crawford-El,* Judge Siberman noted that by 1985, only 30 *Bivens* suits out of 12,000 resulted in a monetary award for the plaintiff. 93 F.3d at 838.

In view thereof, the amicus ACLU simply misses the point when it suggests governments indemnify employees for damages owed, such that the need for vigorous enforcement of qualified immunity is somehow diminished. Whether all governmental entities indemnify their employees is not clear. And of those that do, such indemnity exists by the grace of their respective legislative bodies. The indemnity may cease to be at any time. Qualified immunity also precludes much more than potential damage awards – it precludes the distraction of public officials from their duties, enhances the vigorous exercise of their official discretion, and avoids the inhibition of those willing to serve their government from

entering public service. Given a complex economy that has lead, at least in part, to complex laws and overburdened courts and public resources, preserving the time, energy and talent of government officials through the effective enforcement of qualified immunity is vital to the operation of government.

Nowhere are the policies underlying qualified immunity more starkly displayed than in the context of inmate civil rights lawsuits. The National Center for State Courts studied the profile of inmate § 1983 litigation in 1992 in the nine states[2] that have nearly 50% of the nation's § 1983 litigation. Hanson & Daley, *Challenging the Conditions of Prisons and Jails*, Department of Justice, Bureau of Justice Statistics (1995). The overwhelming majority of prisoners won nothing. Less than one-half of one percent resulted in a favorable verdict for the prisoner. *Id.* at 36.

Between 1990 and 1995, the number of inmates in federal and state prisons rose by 43% and now exceeds one million. Report of Department of Justice (August 7, 1997), and Corrections Yearbook (1995). Prison operation demands the exercise of discretion in the face of extraordinary and competing demands: growing inmate populations, scarce resources, and society's goals for incarceration. As recently as *Lewis v. Casey,* this Court has recognized the wide discretion to which prison officials are entitled, if exercised within the bounds of the Constitution. 116 S.Ct. 2174, 2185 (1996). They are due this discretion in part because of the "strong considerations of comity" owed by the federal courts to the States. *Id.* (*citing Preiser v. Rodriguez,* 411 U.S. 475, 492 (1973)).

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[2]Alabama, California, Florida, Indiana, Louisiana, Missouri, New York, Pennsylvania and Texas.

The D.C. Circuit's clear and convincing evidence standard is a measured response that effectively protects the discretion of such officials, in addition to effectuating the other goals of qualified immunity.

B. Alternatively, this Court should address the issue left open in *Leatherman v. Tarrant County Narcotics Unit,* 507 U.S. 163 (1993), confirming that its qualified immunity jurisprudence requires, at a minimum, a heightened pleading standard in cases involving individual government officials.

1. Heightened pleading is necessary so that the district court can make an expedient determination of defendants' entitlement to qualified immunity as mandated by this Court.

This Court has instructed the lower federal courts that the availability of the defense of qualified immunity is to be determined at the earliest possible stage of a litigation. *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987). In order to comply with that mandate, many of those courts have required something more than the generalized allegation that Crawford-El made. To preclude the courts from imposing that requirement would effectively prevent them from complying with the *Anderson v. Creighton* mandate and would thus prevent government officials in the amici states from being relieved at the earliest possible date from the

burdens and distractions imposed by claims that are so easily made.[3]

If district courts are to make the qualified immunity determination with the expedience required by *Anderson*, they must be informed by specific, concrete facts outlining the claim in the plaintiff's complaint. This heightened pleading standard is necessary because without such facts, an early qualified immunity determination is at best not fully informed, and at worst, impossible. The end result is an erroneous determination, if not a total failure to make the determination, and in either case may subject the defendant officials to suit, needlessly taking their attention and energies away from important duties. These are precisely the types of inefficiencies in government that the qualified immunity doctrine was designed to prevent. *Siegert*, 500 U.S. at 232-33.

All federal circuits have, at some time, recognized the need for a statement of specific facts outlining § 1983 claims and have required the plaintiff to set out those facts.[4] This

[3]This is the reason that another suggestion of the amicus ACLU fails. The ACLU suggests that officials' entitlement to qualified immunity is protected by their ability to file pre-discovery motions for summary judgment. Officials should not be required to guess what a plaintiff means in a non-specific complaint and then engage in investigation, gather documents, interview witnesses, and prepare affidavits in order to prepare a motion for summary judgment. That does not protect officials from the burdens of litigation. And it places officials in the impossible position of attempting to assert their entitlement to qualified immunity without knowledge of the alleged facts on which a claim is based.

[4]*Krohn v. U.S.*, 742 F.2d 24, 31-32 (1st Cir. 1984); *Salahuddin v. Cuomo*, 861 F.2d 40, 43 (2d Cir. 1988); *Darr v. Wolfe*, 767 F.2d 79, 80 (3d Cir. 1985); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763-64 (4th Cir. 1990); *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995)(en banc); *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995); *Patton v.*

Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) has not diminished the need for heightened pleading in § 1983 claims against officials with potential qualified immunity from suit. The danger of distracting public officials from their duties with meritless claims and the concern that it will be impossible to attract quality candidates to state office remain. Qualified immunity remains a vital defense, the viability of which is destroyed if defendants' entitlement to it is not determined at the outset of the action. Without heightened pleading the qualified immunity determination cannot be made and the defense is lost.

The Sixth Circuit recognized this continuing need for heightened pleading even in the wake of this Court's *Leatherman* decision in its decision in *Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir. 1995). Faced with propriety of a heightened pleading standard in a suit against a public official who asserted qualified immunity, the Sixth Circuit aptly noted that failure to impose such a standard at the pleading stage would "eviscerate the substantive rights afforded by the qualified immunity defense" and render the "promise of early exit" from suit "empty." *Veney*, 70 F.3d at 922. Other courts have also continued to apply the heightened pleading standard post-*Leatherman*. *See, Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir. 1991); *Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir. 1995); *Edgington v. Missouri Dep't of Corrections*, 52

Przybylski, 822 F.2d 697, 701 (7th Cir. 1987)(requiring factual specificity of personal involvement when head of corrections department sued); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989) *cert denied* 493 U.S. 1088 (1990); *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991)(adopting heightened pleading standard in cases where subjective intent is element of claim); *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. den.* 507 U.S. 987 (1993); *Hunter v. District of Columbia*, 943 F.2d 69, 76 (D.C. Cir. 1991).

F.3d 777, 780 (8th Cir. 1995). Because heightened pleading is necessary to the preservation of the qualified immunity defense, this Court should specifically affirm its use in § 1983 and *Bivens* actions against government officials potentially entitled to assert the defense.

2. Rules 8 and 9(b) do not preclude the use of a heightened pleading standard in cases where government officials' entitlement to qualified immunity must be determined.

The requirement of a heightened pleading standard in actions where the defense of qualified immunity is raised is consistent with the Federal Rules of Civil Procedure. At work here is the tension between the Rules Enabling Act and Federal Rules of Civil Procedure 8 and 9(b). Rules 8(a)(2) and 8 (e)(1) are said to establish a requirement of "notice pleading" in federal court. Rule 9(b) expressly requires particularity in pleading actions alleging fraud and mistake.[5] Utilizing the doctrine of *expressio unius est exclusio alterius*, the Court in *Leatherman* read Rule 9(b) as precluding a heightened pleading standard beyond that required by Rule 8 in a § 1983 claim where the defendant was not entitled to qualified immunity. *Leatherman*, 507 U.S. at 168. But the *Leatherman* Court did not extend this preclusion to cases involving the assertion of the qualified immunity defense by

[5]Notably the historical purpose of the Rule 9(b) pleading requirement is identical to justifications asserted for heightened pleading in § 1983 actions. Allegations of fraud and mistake are frequently advanced lightly for their nuisance value or settlement value with little hope they will be successful. 5 Wright & Miller Federal Practice and Procedure Civil 2d § 1296 (1990). Rule 9(b) operates to stop plaintiffs from engaging in costly and time consuming discovery on a groundless claim which is designed only to increase the likelihood defendant will settle in order to avoid the costs of discovery. *Id., citing Zuckerman v. Harnischfeger Corp.*, 591 F. Supp. 112 (D.N.Y. 1984).

government officials. *Id* at 166-67. Rather, the Court left open the question of whether its qualified immunity jurisprudence would require the application of a heightened pleading standard in such cases despite the provisions of Rules 8 and 9(b). *Id.*

As a preliminary matter, the preclusive effect of Rule 9(b) need not even be addressed to determine the requisite pleading standard in § 1983 claims against government officials who enjoy qualified immunity. Even the liberal standard set forth in Rule 8 requires the plaintiff to state his claim with enough specificity to make a determination of the qualified immunity issue. Rule 8(a)(2) requires the plaintiff to set forth a short plain statement of the claim showing he is entitled to relief. The "notice pleading" standard set out by Rule 8 does not entirely relieve plaintiff of any burden to plead facts entitling him to relief. Plaintiff must make a statement of the claim which will give defendant notice of the grounds upon which the claim rests. *Conley v. Gibson*, 355 U.S. 41 (1957). Implicit in this holding is the statement that Rule 8 envisions more than mere conclusory allegations; it calls for a "statement of the circumstances, occurrences and events in support of the claim presented." *See* 5 Wright & Miller, Federal Practice and Procedure Civil 2d § 1202 (1990) (*quoting* Advisory Committee's 1955 Report). *Accord, Ascon Properties, Inc. v. Mobil Oil* Co., 866 F.2d 1149, 1155 (9th Cir. 1989), and *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39 (6th Cir. 1988).

Moreover, the adequacy of a pleading is not universal, it is case specific. As the Tenth Circuit noted in *Mountain View Pharmacy v. Abbott Laboratories*, 630 F.2d 1383, 1386 (1980), Rule 8(a)(2) calls for notice to the defendant, but what constitutes notice changes from case to case depending on the complexity of the claim. In cases involving defendants who enjoy qualified immunity, no case can be

stated unless plaintiff sets forth facts demonstrating an absence of immunity. This follows from the Court's prior jurisprudence on the qualified immunity issue detailing that it is immunity from the processes of litigation such as discovery to which government officials are entitled. *Anderson v. Creighton*, 483 U.S. at 646, *Seigert v. Gilley*, 500 U.S. at 232-33. A complaint that complies with Rule 8 allows plaintiff to commence discovery to flesh out his claim; therefore, to accommodate the right to qualified immunity from discovery as well as trial, a well-pleaded complaint under Rule 8 should be required to demonstrate that the defendant is not entitled to qualified immunity and, therefore, discovery is appropriate. This does not redefine Rule 9(b); rather it is merely a statement of the definition of a well pleaded § 1983 complaint against government officials. This is precisely the reasoning followed by Judge Higginbotham in his well reasoned concurrence in *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) (J. Higginbotham concurring).

Even if the Court does not read the pleading requirement of Rule 8(a)(2) as requiring a statement of facts negating defendant's right to qualified immunity, Rule 9(b) does not preclude requiring a heightened pleading standard in § 1983 claims against government officials. It is true that federal rules enjoy a presumptive validity. *Hanna v. Plummer*, 380 U.S. 460, 471 (1965). However, the Rules Enabling Act, 28 U.S.C. § 2072(b), provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Entitlement to qualified immunity is a substantive right. *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818. As argued above, heightened pleading standards are necessary to protect this right and the Federal Rules of Civil Procedure cannot eviscerate the right to qualified immunity by prohibiting the use of such standards in § 1983 and *Bivens* actions.

Justice Kennedy argued persuasively on this point in his concurrence in *Siegert v. Gilley*, 500 U.S. 226, 235 (1995). There he pointed out that the immunity defense prevails over the rules.

> A heightened pleading standard is a necessary and appropriate accommodation... [I]t is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b)... But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine. The substantive defense of immunity prevails.

A heightened pleading standard is not only necessary in cases where the defense of qualified immunity is raised, it is compelled by the Court's prior jurisprudence on the qualified immunity issue. This Court should definitively rule that in § 1983 or *Bivens* actions asserting the violation of a constitutional right, a plaintiff is properly required to meet a heightened pleading standard setting forth in the Complaint specific facts supporting his or her claims.

CONCLUSION

For the reasons stated, the decision of the District of Columbia Court of Appeals should be affirmed.

Respectfully submitted,

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